Supreme Court, U.S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1997

ANTHONY CIOCCHETTI, JR.,
Petitioner,

v.

THE DISTRICT COURT OF JEFFERSON COUNTY, COLORADO and THE HONORABLE HENRY E. NIETO, DISTRICT JUDGE,
Respondents.

On Petition for Writ of Certiorari
To The Colorado Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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29 pp.

QUESTION PRESENTED

Whether, under the Fifth Amendment, a defendant who has pled guilty to a lesser-included offence and paid restitution may subsequently be sentenced for contempt for the conduct involved in the greater offence with which he was originally charged.

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THE DISTRICT COURT OF JEFFERSON COUNTY, COLORADO and THE HONORABLE HENRY E. NIETO, DISTRICT JUDGE,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

Petitioner Anthony Ciocchetti, Jr. (Ciocchetti) prays that a writ of certiorari issue to review the judgment of the Colorado Court of Appeals that affirmed the contempt conviction and sentence entered by the Jefferson County District Court.

OPINIONS BELOW

The opinion of the Colorado Court of Appeals giving rise to this petition was not selected for publication. It is reproduced in Appendix A, included herein. By order dated July 28, 1997, the Colorado Supreme Court denied Ciocchetti's petition for writ of certiorari. See Appendix B, included herein.

JURISDICTION

The judgment of the Colorado Court of Appeals was entered on October 10, 1996. After the Colorado Court of Appeals denied a timely petition for rehearing, Ciocchetti petitioned the Colorado Supreme Court for a writ of certiorari. That petition was denied on July 28, 1997.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

The **Fifth Amendment to the Constitution of the United States** provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section § 18-5-206(1), Colorado Revised Statutes, provides:

> (1) If a person, with intent to defraud a creditor by defeating, impairing, or rendering worthless or unenforceable any security interest, sells, assigns, transfers, conveys, pledges, encumbers, conceals, destroys, or disposes of any collateral subject to a security interest:
>
> (a) Such person commits a class 3 misdemeanor if the

value of the collateral is less than one hundred dollars;

(b) Such person commits a class 2 misdemeanor if the value of the collateral is one hundred dollars or more but less than four hundred dollars;

(c) Such person commits a class 5 felony if the value of the collateral is four hundred dollars or more but less than fifteen thousand dollars; and

(d) Such person commits a class 3 felony if the value of the collateral is fifteen thousand dollars or more.

STATEMENT OF THE CASE

A. Proceedings in the Trial Court

In March 1992, Ciocchetti and two associates purchased a new Ford Explorer from Lakewood Ford, Inc., in Lakewood, Colorado. The vehicle was purchased on credit, but no payments were made. Ciocchetti took the vehicle to Chicago in July for business purposes, entrusted it to an associate there, and never saw it again. In November 1992, Lakewood Ford filed a civil action seeking payment in full or return of the vehicle. The vehicle was recovered by the police in June 1994, in California, and returned to Lakewood Ford.

In September 1993, the Jefferson County District Attorney's Office filed charges against Ciocchetti under C.R.S. § 18-5-206(1), which provides that concealing collateral with intent to defraud a secured creditor is a felony. In November 1993, the Jefferson County District Court ordered Ciocchetti to return the vehicle to Lakewood Ford, and when he did not comply with that order, issued a contempt citation at the request of Lakewood Ford.

A hearing on the contempt citation was held before Respondent Judge Henry Nieto (Judge Nieto) on December 5-6, 1994, in conjunction and simultaneously with the hearing on Lakewood Ford's civil action. Ciocchetti appeared *pro se* in the civil case, but was represented by counsel for the contempt citation. Due to the illness of a co-defendant in the civil case, the trial was continued to May 19, 1995.

The criminal case was resolved in April, 1995, when Ciocchetti pled guilty to a lesser included offense, second-degree forgery. He was ordered to pay, and did pay restitution in the amount of $18,672.[1] Lakewood Ford sold the vehicle to another buyer for $16,000, thus recovering a total of $34,672.

At the conclusion of the civil trial in May 1995, Judge Nieto awarded Lakewood Ford $17,565 in costs and attorney fees, two-thirds of which was to be paid by Ciocchetti. With respect to the contempt citation, Judge Nieto found that Ciocchetti had control over the missing vehicle at all relevant times and could have returned it to Lakewood Ford. Transcript of hearing, Record Vol. VIII at 1060.

Based on his finding that Ciocchetti could have returned the vehicle when the order was first issued, Judge Nieto sentenced him to six months in the county jail, for contempt. His attorney moved for reconsideration, arguing, *inter alia*, that Judge Nieto had imposed the sentence in violation of Ciocchetti's right to be free from double jeopardy. After a hearing on May 23, 1995, Judge Nieto denied the motion. Transcript of hearing, Record Vol. VI at 39. Ciocchetti was allowed to post bond, and the sentence was stayed for the duration of his appeal to the Colorado appellate courts.

---

[1] Restitution was ordered by Judge Gaspar Perricone, who presided over a different division of the Jefferson County Court than Respondent Judge Nieto.

B. Proceedings in the Colorado Court of Appeals

The court of appeals affirmed the contempt judgment and sentence. In doing so, it considered a number of issues other than the one presented in this Petition, but only the Double Jeopardy issue is of sufficiently general interest to warrant review by this Court.

With regard to that issue, the court of appeals held that although the double jeopardy prohibition of the Fifth Amendment does apply to criminal contempt proceedings, Ciocchetti's prosecution and sentence for contempt were not prohibited. Referring to the "same elements" standard applied in *People v. Allen*, 868 P.2d 379 (Colo. 1994) (following *Blockburger v. United States*, 284 U.S. 299 (1932), and *United States v. Dixon*, 509 U.S. 688 (1993)), the court declared that neither the offense charged (concealing collateral with intent to defraud a creditor) nor the offense to which Ciocchetti pleaded guilty (second degree forgery) "encompasses" the same elements as contempt. App. A at 9.

The Colorado Supreme Court declined to review the Court of Appeals decision, leaving undisturbed the judgment and sentence imposed by the trial court. App. B.

REASONS FOR GRANTING THE WRIT

I. In affirming the trial court's contempt judgment and sentence, the Colorado Court of Appeals decided an important question of federal law that has not been, but should be settled by this Court.

In the sixty-five years since this Court decided *Blockburger v. United States*, 384 U.S 299 (1932), it has issued numerous opinions, not all of them in harmony, interpreting the Double

Jeopardy Clause of the Fifth Amendment. The issue of what constitutes the "same offence" in the meaning of the Double Jeopardy Clause is still essentially unresolved.

In its latest opinion addressing this issue, the Court cited the *Blockburger* or "same-elements" as the standard by which alternative approaches should be judged. *United States v. Dixon*, 509 U.S. 688, 704 (1993). The Colorado Court of Appeals dutifully followed *Dixon* in Ciocchetti's case, citing *People v. Allen*, 868 P.2d 379 (Colo. 1994) (*Allen III*) as authority for its conclusion that Ciocchetti's contempt prosecution and sentence were not barred by the Double Jeopardy Clause because the elements of contempt are not identical to the elements of defrauding a secured creditor.

The *Allen* case, described here in detail because it controlled the state court disposition of the Ciocchetti case, illustrates the confusion and inconsistency resulting from the Court's modifications or reversals of its position on the Double Jeopardy Clause over the last twenty years. The respondent, Ralph Allen, was the defendant in a criminal case arising from altercations with his estranged wife. Mrs. Allen had obtained a permanent restraining order prohibiting Allen from entering her home or contacting her in any way, but Allen nevertheless broke into her house and threatened to kill her. Mrs. Allen filed a motion for contempt, and after an evidentiary hearing, the county court sentenced him to six months in jail. Subsequent to that adjudication, and based on the same incident, Allen was charged with second-degree burglary, criminal mischief, first degree criminal trespass, and menacing. The county court dismissed all of these charges on the basis of double jeopardy. *People v. Allen*, 787 P.2d 174 (Colo. App. 1989) (*Allen I*).

The Colorado Court of Appeals reversed, citing *Blockburger* and holding that double jeopardy did not bar the second prosecution if each offense required proof of a fact that the other

did not. *Allen I*, 787 P.2d at 175. On remand, after a jury trial in the county court, Allen was convicted of criminal trespass and misdemeanor menacing. The district court, however, vacated the conviction and sentence, holding that "the double jeopardy standard annunciated in [*Grady v. Corbin*, 495 U.S. 508 (1990)] must be retroactively applied." *People v. Allen*, 843 P.2d 97, 99 (Colo. App. 1992) (*Allen II*). The Colorado Court of Appeals affirmed, holding that "the conduct needed to establish the essential elements of the crimes of criminal trespass and menacing is the same conduct for which [Allen] was held in contempt" and that under *Grady*, prosecution of the latter offenses was barred by the Double Jeopardy Clause. *Allen II*, 843 P.2d at 100.

By the time the Allen case reached the Colorado Supreme Court, *Grady* had been overruled by *Dixon*, and the Colorado court found it necessary to reinstate *Allen I* and remand the case for reinstatement of the criminal trespass and menacing convictions. *People v. Allen*, 868 P.2d 379 (Colo. 1994) (*Allen III*). The *Allen III* court interpreted *Dixon* as requiring "all of the elements of a criminal charge to be incorporated in a contempt order before subsequent prosecution is barred," and therefore concluded that because the restraining order did not incorporate all of the elements of criminal trespass, prosecution of Allen for trespass was not barred by the Double Jeopardy Clause. 868 P.2d at 385 (emphasis in the original).

As a guide for state courts deciding cases like Ciocchetti's, or Allen's, where the issue is whether a contempt conviction precludes--or is precluded by--prosecution for the underlying offenses, *Dixon* leaves much to be desired. It is clear only in its holding, by a five-to-four majority, that *Grady* is overruled.

The *Dixon* majority held, for example, that although the defendant Foster could not be prosecuted for simple assault because he had already been convicted for contempt, for assaulting his wife, the Double Jeopardy clause did not bar subsequent

prosecution for the related crimes committed in the same episode as the assault, because those crimes did not require proof that Foster knew about the restraining order. *Dixon*, 509 U.S. at 700-701. This reasoning not only defies common sense, it also generates dissension within the Court, as evidenced by the multiple concurrences and dissents in the *Dixon* opinion, and thereby reduces confidence in the stability of the holding.

In contrast, the earlier cases on which the majority relied in *Grady*--in particular, *Brown v. Ohio*, 432 U.S. 161 (1977) and *Harris v. Oklahoma*, 433 U.S. 682 (1977)--were decided on a relatively simple adaptation of the *Blockburger* test to the specific circumstances in which one offense is "included" within the other. In *Brown,* the Court decided that the defendant's prior conviction for the "lesser included offense" of joyriding prohibited his subsequent prosecution for auto theft, because, under *Blockburger*, joyriding and auto theft constitute the same offense within the meaning of the Double Jeopardy Clause. *Brown*, 432 U.S. at 168. "Whatever the sequence may be," the Court concluded, " the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense." *Id.* at 169.

Similarly, in *Harris*, the Court held that "when, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime, after conviction of the greater one." 433 U.S at 682.

Brown and *Harris*, neither of which was overruled by *Dixon*, have the merit of being relatively easy to apply to a variety of cases. Both are free of the anomalous holding, which appears in *Dixon* and also in the Colorado Court of Appeals opinion in Ciocchetti's case, that a subsequent prosecution is not barred unless <u>all</u> of the elements of the first offense are present in the second.

In *Grady,* the Court drew from *Brown* and *Harris* the conclusion that a "technical comparison" of the elements of the two offenses, as required by *Blockburger,* does not protect defendants sufficiently from the burdens of multiple trials. 495 U.S. at 520. If the *Blockburger* test were all that is required, the Court reasoned, the State could have subjected Corbin, the defendant in *Grady,* to four trials: one for each of his two traffic offenses, one for assault, and one for homicide. To avoid such an outcome, the Court upheld the state court's decision to bar prosecution of the assault and homicide charges, on the grounds that the state would have had to prove the conduct for which Corbin was convicted on the traffic charges in order to establish essential elements of the homicide and assault charges. *Id.* at 523. Thus, the traffic charges were, in effect, a "species of lesser included offense," see *Illinois v. Vitale*, 447 U.S. 410, 420 (1980), and subsequent prosecution of the greater offense was barred by the Fifth Amendment.

In *Dixon* the Court upheld the "lesser included offense" rule developed in *Brown* and *Harris,* holding that the defendant Dixon could not be prosecuted for cocaine possession after he already been prosecuted for contempt based on the same offense. 509 U.S. at 698. This result appears to have been due entirely to the broad scope of Dixon's release form, which prohibited him from committing "any criminal offense" and thus "incorporated the entire governing criminal code." *Id.*

The Ciocchetti case resembles *Dixon*, for Ciocchetti, like the *Dixon* defendants, was held in nonsummary contempt and punished for violating a court order, and was also charged with a criminal offense based on the same conduct for which he was held in contempt. Yet, *Dixon* offers no clear guide to the correct resolution of the Ciocchetti case, because it simultaneously endorses *Blockburger* and appears to affirm *Brown* and *Harris*. See 509 U.S. at 704, 706-707.

Under *Blockburger*, as applied by the Colorado Court of Appeals in this case, Ciocchetti's contempt conviction and sentence were not barred by the Double Jeopardy Clause. The "same elements" test indicates that he was charged with two separate offenses: first, concealing collateral with intent to defraud a creditor; second, disobeying an order of the Jefferson County District Court, which commanded him to return the collateral (i.e., the missing Ford Explorer) to its owner, Lakewood Ford. Because Judge Nieto viewed these as two separate offenses, he saw no difficulty in sentencing Ciocchetti to six months in jail for contempt, even though Ciocchetti had already pled guilty to a lesser included offense and had paid restitution in compliance with an order entered by a different Jefferson County District Court judge. If *Blockburger* is the only test, Judge Nieto was right.

On the other hand, if *Grady* not been overruled by *Dixon*, its central holding would absolutely have barred Ciocchetti's contempt conviction, for that conviction was based entirely on evidence of conduct for which Cioccetti had already been prosecuted, that is, his failure to return the missing Ford Explorer.

Under the "lesser-included offense" approach adopted in *Brown* and *Harris*, Ciocchetti's conviction and sentence for contempt may or may not have been error.[2] Even *Dixon*, Ciocchetti's failure to return the vehicle, after having been ordered to do so in November 1993, could be considered a "species of lesser included offense" relative to the prior charge brought by the district attorney, i.e., concealing collateral with intent to defraud. *Dixon*, 509 U.S. at 698. Unfortunately, *Dixon* does not unequivocally dictate this outcome.

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[2] It is doubtful that Ciocchetti should even have been charged with contempt, in view of the pending criminal charge against him. That issue was not raised in the trial court, however, and the only issue before the court of appeals was whether he should have been convicted and sentenced for contempt after the criminal charge was dismissed.

unequivocally dictate this outcome.

Prosecuting Ciocchetti for contempt in this case is analogous to prosecuting the defendant Foster for assaulting his wife after he already had been convicted of contempt for violating an order forbidding him from assaulting his wife. It is also analogous to prosecuting the defendant Dixon for possession of cocaine after had he had been convicted for violating an order commanding him not to commit any criminal offense. In both instances, this Court held that the second prosecution was barred by the Double Jeopardy clause.

Ciocchetti's case differs from the two *Dixon* cases in that he was prosecuted for the "underlying substantive criminal offense" before he was convicted of contempt. The sequence should not affect the analysis, however. See *Brown*, 432 U.S. at 168, holding that "whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."

The fact that Ciocchetti entered into a plea bargain with the district attorney, wherein he pleaded guilty to second degree forgery with restitution and the district attorney dismissed the fraud charge, also should not affect the analysis. The plea bargain was the result of a prosecution, and whether restitution is deemed "punishment" or not, the Fifth Amendment forbids successive prosecution as well as punishment for the same offense. *Dixon*, 509 U.S. 696, citing *North Carolina v. Pearce*, 396 U.S. 711 (1969).

Apart from these minor discrepancies between Ciocchetti's case and the cases decided by this Court in the past, the fundamental problem is that this Court has not provided a clear and unambiguous rule for deciding a case in which the same offense is prosecuted as contempt and as a statutory violation. If *Blockburger* is the only test, then a second prosecution, or

punishment, is always permissible because contempt, by definition, involves disobedience to a specific court order. If *Brown* is the test, then a second prosecution may be permissible, unless the order was broad enough, as in *Dixon*, to encompass the statutory violation.

This is a degree of ambiguity that this Court should not tolerate. Ciocchetti's case is worthy of review for the purpose of clarifying the Court's standard as to whether a subsequent prosecution under these circumstances is barred by the Double Jeopardy Clause.

II. The Question Presented Is Important

The constitutional provision against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. *Green v. United States*, 355 U.S. 184, 187 (1957). The underlying idea, "deeply ingrained" in Anglo-American jurisprudence, is

> that the State, with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thus subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . .

Id.

When a subsequent prosecution is barred by the Double Jeopardy clause, the prosecutorial zeal, or malice, foreseen by the framers of the Constitution may all too readily find expression in a contempt citation. If the Colorado Court of Appeals is not reversed in this case, defendants in Colorado, and elsewhere, face an increased risk of "embarrassment, expense, and ordeal," for it may often be easier to prove that a defendant violated a restraining

order than it is to prove each of the elements of a criminal offense,

Three recent examples will serve to illustrate the problem; to these should be added *People v. Allen*, the Colorado case described above.

In, *Iowa v. Kraklio*, 560 N.W.2d 16 (Iowa 1997), the defendant was permanently enjoined from collecting fees from Iowa consumers under the pretense of obtaining damages through a federal class action lawsuit. Proof that the defendant violated the restraining order, and therefore was in contempt of court, was obtained when he accepted such a fee from an undercover agent. After he was fined and sentenced to jail for contempt, he was charged with securities fraud, based on the same promotional scheme that the restraining order was intended to supress. Citing *Blockburger*and *Dixon,* the court affirmed the jury verdict against Kraklio, holding that because the restraining order merely enjoined consumer fraud, prosecution for securities fraud under a different statute was not barred by the Double Jeopardy Clause.

Similarly, the Kentucky Supreme Court overruled the intermediate appellate court and held that under *Dixon*, prosecution of three defendants for the underlying crimes of burglary, rape, and assault, after they had been convicted and sentenced for violation of restraining orders enjoining the same conduct, was not barred by the Double Jeopardy Clause. *Kentucky v. Burge*, 947 S.W.2d 805 (Ky. 1996) (consolidating three appeals). The court's rationale was that in order to obtain a contempt conviction, the state had to prove that the defendant knew that a court order prohibiting the conduct was in effect; thus, "each contempt conviction required proof of an element which the felony charges did not." *Id.* at 812.

The New Mexico Court of Appeals produced an even more formalistic opinion in a domestic matter, holding that because the defendant had violated an "Order Prohibiting Domestic Violence"

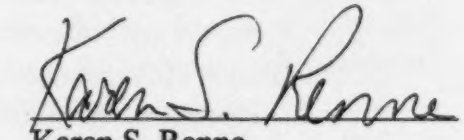
that directed the defendant to "stay away" from and "not abuse" his wife, his contempt conviction did not preclude subsequent prosecution for battery, stalking, and harassment. *New Mexico v. Gonzales*, 940 P.2d 185 (N.M. Ct. App. 1997), *cert. denied* (1997). The court reached this conclusion despite the fact that the restraining order specifically defined "abuse" as "harassing, restraining, assaulting, . . . battering in any manner or stalking." *Gonzales,* 940 P.2d at 186. Its rationale was that under *Dixon,* 'same conduct' is not the proper test for evaluating double jeopardy claims. *Id.* at 189.

It is evident that in these state courts, at least, *Dixon* has been used to justify multiple prosecutions for the same conduct, an abuse of prosecutorial power that the Double Jeopardy Clause clearly was intended to prevent.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted this 27th day of October, 1997.



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APPENDIX A

COLORADO COURT OF APPEALS October 10, 1996
No. 95 CA 0869 **NOT SELECTED FOR PUBLICATION**

Lakewood Ford, Inc., Plaintiff,

v.

Anthony Ciocchetti, Defendant-Appellant

and Concerning the Honorable Judge Henry Nieto, of the District Court, Jefferson County,

Appellee.

Appeal from the District Court of Jefferson County
Honorable Henry E. Nieto, Judge
No. 92 CV 2795

Division IV
Opinion by JUDGE CASEBOLT
Ney and Davidson, JJ., concur

JUDGMENT AND SENTENCE AFFIRMED

In this action involving a purchase of a motor vehicle, defendant, Anthony Ciocchetti, appeals the judgment of the trial court finding him in contempt of court and sentencing him to 175 days in jail. We affirm.

In 1992, an automobile dealership sold a vehicle to Ciocchetti's girlfriend under an installment purchase agreement. Because payments were not timely made, the dealership brought a civil action against, *inter alia*, Ciocchetti and his girlfriend, seeking payment in full or the return of the car which was then possessed by Ciocchetti.

Ciocchetti appeared *pro se* in that civil action, and repeatedly ignored the trial court's order to return the car or to provide information to assist in its recovery. After a request by the dealership, the trial court issued a contempt citation against Ciocchetti.

Shortly after the citation was issued, an attorney filed an entry of appearance on behalf of Ciocchetti "for the sole and limited purpose" of defending against the contempt citation. The trial court allowed the limited appearance.

On December 5, 1994, at the request of Ciocchetti's attorney, the civil trial and trial upon the contempt citation against Ciocchetti proceeded simultaneously. Because the same evidence was relevant to both actions, the trial court informed Ciocchetti and his counsel that the court would consider all the evidence presented in the combined proceeding to determine the contempt issues. Ciocchetti's attorney was present throughout the proceedings.

Ciocchetti testified during the trial, denying any wrongdoing in connection with the vehicle. His attorney was given the opportunity to cross-examine all witnesses. Presentation of evidence continued over a number of days, finally concluding

in May 1995.

In April 1995, in a criminal case arising out of the same events, Ciocchetti pleaded guilty to second degree forgery in violation of §18-5-104, C.R.S., and the prosecution dismissed the charged offense of defrauding a secured creditor in violation of § 18-5-206, C.R.S.

After requesting written closing arguments, the trial court scheduled a final hearing for May 19, 1995. On that date, new counsel for Ciocchetti filed motions to dismiss. As pertinent here, the motions alleged violations of numerous constitutional protections, including the Sixth Amendment right to effective assistance of counsel, the right to cross-examine adverse witnesses, and Fifth Amendment rights against self-incrimination and double jeopardy.

At the hearing, after deferring ruling on the motions, the trial court entered judgment in both the civil and contempt actions. Incorporating its findings from the civil case--that Ciocchetti had retained possession of the vehicle and had the ability to return it--the trial court found Ciocchetti in contempt and sentenced him to 175 days in jail.

Four days after the trial court imposed Ciocchetti's sentence, the court denied his motion to dismiss, and this appeal followed.

I.

Ciocchetti first contends that the trial court improperly conducted the contempt proceeding because the court failed to advise him of his rights as required by C.R.C.P. 107(d)(1). Further, he asserts that the trial court erred in failing to determine his motion to dismiss prior to the imposition of his sentence. We disagree.

C.R.C.P. 107 guides, but does not control, procedures for prosecuting contempt. *People v. Tyer*, 796 P.2d 15 (Colo. App. 1990). Thus, while the procedures set forth in the rules of civil procedure are generally followed by courts in prosecuting contempt, they are not exclusive. *People v. Razatos*, 699 P.2d 970 (Colo. 1985).

Effective April 1, 1995, the supreme court amended C.R.C.P. 107(d) to provide, as pertinent here: "At the first appearance [in an indirect contempt proceeding], the person shall be advised of the right to be represented by an attorney . . . the right to present witnesses and evidence, the right to cross-examine all adverse witnesses, . . . the right to remain silent, [and] the right to testify at trial . . . ." Previous versions of C.R.C.P. 107(d) did not include the advisement requirements.

Here, Ciocchetti's first appearance on the contempt citation occurred well before the effective date of the amendment to C.R.C.P. 107. Thus, he was not entitled to this advisement prior to giving testimony in the combined proceedings. *See Mcconnell v. District Court,* 680 P.2d 528 (Colo. 1984) (when case filed before effective date of new rule of civil procedure, previous rule applicable); *Harlan C. Stientjes, P.C. v. Olde-Comberlin Auctioneers, Inc.*, 754 P.2d 1384 (Colo. App. 1988) (rule of civil procedure applicable on or after its effective date).

Ciocchetti further contends that he was denied the opportunity to defend against the contempt charge because the trial court refused to hear his motion to dismiss prior to the conclusion of the contempt hearing. Again, we disagree.

We are not aware of any authority that requires a trial court to suspend a trial involving multiple parties and issues and to determine a motion to dismiss prior to judgment. Rather, the trial court has discretion in determining when it will hear and resolve motions during trial. *See Felt v. Cleghorm*, 29 P.813 (Colo. 1892)

(the conduct of trial is fully within the discretion of the trial court).

Furthermore, Ciocchetti's motion to dismiss, filed on May 19, 1995, was heard and denied on May 24, 1995. Ciocchetti has failed to demonstrate any prejudice arising from the court's decision to defer ruling on his motion for four days. *Cf. Davison v. Board of County Commissioners*, 585 P.2d 315 (Colo. App. 1978) (party failed to show prejudice from trial court's decision to hear oral motion at same time it considered previously filed written motion).

Accordingly, we reject this contention.

II.

Ciocchetti next asserts that the trial court denied him his Sixth Amendment right to effective assistance of counsel. We disagree.

The Sixth Amendment right to counsel afforded criminal defendants is extended to contempt proceedings. *People v. Lucero*, 584 P.2d 1208 (Colo. 1978); *Griffin v. Jackson*, 759 P.2d 839 (Colo. App. 1989). Therefore, a respondent in a contempt proceeding is entitled to be represented by counsel at the hearing. *P.R.. v. District Court*, 637 P.2d 346 (Colo. 1981).

Ciocchetti argues that because he proceeding *pro se* in the civil trial, he was without adequate assistance of counsel in the contempt proceeding since the court's findings in the civil trial were incorporated into its findings regarding contempt. Ciocchetti, however, does not assert that his counsel was incompetent.

The record reveals that Ciocchetti specifically retained counsel to represent him in all matters relating to the contempt

proceeding. Further, it was Ciocchetti's attorney who suggested that the court schedule the civil trial and the contempt proceedings on the same day and hear the matters simultaneously. Counsel was present throughout the simultaneous civil trial and contempt proceeding and actively participated.

Because Ciocchetti was represented to the full extent that he desired such representation throughout the entire proceeding, by definition, he had assistance of counsel during the presentation of any evidence considered in the civil trial that the trial court also considered in determining the contempt issue. Hence, Ciocchetti's claim of inadequate assistance of counsel must fail.

III.

Ciocchetti next contends that he was denied the right to confront and cross-examine witnesses. We disagree.

A respondent in a contempt proceeding has the right to confront and cross-examine witnesses. *P.R. v. District Court, supra.* Indeed, the primary purpose of the Confrontation Clause of the Sixth Amendment and its counterpart in the Colorado Constitution is to secure for a defendant the opportunity of cross-examination. *People v. District Court*, 869 P.2d 1281 (Colo. 1994). The right to confrontation, however, is not denied simply because the prosecution is permitted to examine a witness whom the defense declines to cross-examine. *People v. District Court, supra.*

Here, Ciocchetti was represented by counsel throughout the contempt proceeding. At the outset of the simultaneous civil trial and contempt proceeding, the trial court told Ciocchetti's attorney to be present for all testimony that could relate to the contempt citation. Ciocchetti's attorney was, in fact, present throughout trial and did cross-examine witnesses. The trial court did nothing to hinder such examination. Hence, no violation of Ciocchetti's right

to cross-examine adverse witnesses occurred.

IV.

Ciocchetti next argues that he was denied his Fifth Amendment right to be free from self-incrimination. We again disagree.

The protection of the Fifth Amendment may be invoked during a contempt proceeding, including the privilege against self-incrimination. *People v. Razatos*, 699 P.2d 970 (Colo. 1985).

A person may incriminate himself or herself either by directly admitting the commission of illegal acts or by relating information that would furnish a link in the chain of evidence needed to prosecute the claimant for a crime. *Tipton v. City of Lakewood*, 595 P.2d 689 (Colo. 1979).

The privilege against self-incrimination, however, is ordinarily not self-executing. An individual will forfeit the privilege if he or she fails to assert it before making an incriminating statement. *People v. District Court*, 894 P.2d 739 (Colo. 1995).

Here, Ciocchetti chose to testify on his own behalf. The practical result of this decision to testify was to waive his constitutional right against self-incrimination. Contrary to Ciocchetti's contention, the absence of an on-the-record advisement of the right prior to the waiver is not an obstacle to the finding of a valid waiver. *People v. Mozee*, 723 P.2d 117 (Colo. 1986). By voluntarily testifying in the combined civil and contempt actions, Ciocchetti cannot now claim that his Fifth Amendment privilege was violated.

Furthermore, the record in this action does not reveal that Ciocchetti made any incriminating statements. In his testimony,

he denied having possession of the vehicle at the time of the trial court's orders to return it. And, contrary to Ciocchetti's argument, a trial court is not required to provide a defendant with an advisement as to his or her Fifth Amendment rights based on the "potential" that the defendant may make an incriminating statement. Thus, Ciocchetti's claim is without merit.

V.

Ciocchetti next asserts that the trial court failed to advise him of his right not to testify pursuant to *People v. Curtis*, 681 P.2d 504 (Colo. 1984) and, therefore, the court's finding of contempt is invalid. We disagree.

In a criminal proceeding, a defendant must be given an advisement in which he or she is informed of the right to testify, the consequences of testifying, and of the right to take the stand regardless of counsel's advise. *People v. Curtis, supra.* The on-the-record *Curtis* advisement is meant to counter a situation in which a defendant's desire to testify is overwhelmed by defense counsel's determination that such testimony would not be the most effective trial strategy. *People v. Harris*, 914 P.2d 425 (Colo. App. 1995).

This concern, however, is not present when the defendant elects to testify. *People v. Mozee, supra.* In such a situation, defense counsel bears the burden of ensuring that a defendant has been advised of the benefits of remaining silent at trial and the consequences of waiving that right. *People v. Drake*, 748 P.2d 1237 (Colo. 1988).

Hence, here, even if we assume, without deciding, that a *Curtis* advisement should be given in a contempt proceeding, the failure to give such advisement was harmless because Ciocchetti elected to testify on his own behalf.

Ciocchetti further argues that *People v. Curtis, supra*, requires the trial court to advise every criminal defendant of his right not to testify. In *People v. Mozee, supra,* the supreme court specifically rejected this argument, holding that the absence of a *Curtis* advisement did not constitute reversible error because the defendant chose to testify. We see no basis to distinguish *Mozee* here; consequently, we reject this contention.

VI.

Ciocchetti next asserts that the trial court violated his Fifth Amendment right against double jeopardy by finding him guilty of contempt after he had earlier pleaded guilty to the crime of second degree forgery. We disagree.

Double jeopardy prohibitions apply in criminal contempt proceedings. *United States v. Dixon*, 509 U.S. 688 (1993). Thus, a respondent in a contempt proceeding may not be twice placed in jeopardy for the same offense. *People v. Allen*, 868 P.2d 379 (Colo. 1994).

Colorado adheres to the "same offense" standard for purposes of the double jeopardy prohibition against successive prosecutions for separate crimes. To determine whether two offenses constitute the same offense, the "same elements" test is applied. That test prohibits a subsequent prosecution when all the elements of the offense in the second prosecution are the same as the elements of the offense in the first prosecution. Double jeopardy prohibitions, however, are not applicable when a single act constitutes a violation of two statutes, if each statute requires proof of an additional fact that the other does not. *People v. Allen, supra. See Blockburger v. United States*, 284 U.S. 299 (1932).

The elements necessary to prove contempt of court are knowledge of the court's order and deliberate disobedience of the order in violation of the authority and dignity of the court. *People*

v. Allen, supra.

To prove second degree forgery in violation of §18-5-104, C.R.S., it must be demonstrated that a person, with intent to defraud, has falsely made, completed, or altered a written instrument.

To prove a charge of defrauding a secured creditor in violation of §18-5-206, C.R.S., it must be demonstrated that a person, with intent to defraud a creditor by impairing a security interest, has concealed any collateral subject to a security interest.

Here, neither the offense charged nor the offense to which Ciocchetti pleaded guilty encompass the same elements as the contempt citation. Thus, the prosecution and punishment of Ciocchetti for contempt is not barred by double jeopardy.

VII.

Ciocchetti lastly contends that the trial court's imposition of a 175-day jail sentence constitutes an abuse of discretion and cruel and unusual punishment. We disagree.

When imposing punishment for contempt, a court must act with care and deliberation and take into consideration surrounding facts and circumstances. The punishment must be commensurate with the gravity of the offense and must not be excessive. *Shotkin v. Atchinson, Topeka & Santa Fe R.R. Co.*, 235 P.2d 990 (Colo. 1951).

Here, the trial court found that Ciocchetti's intentional refusal to follow the orders of the court caused harm to other parties, demonstrated a willful and wanton disregard for the dignity of the court, and caused the case to "deteriorate into a legal nightmare." Ciocchetti has not demonstrated that his sentence was excessive or not reasonably related to the nature of his misconduct.

People v. Tyer, supra (six month term of imprisonment upheld when defendant deposited fraudulently obtained funds in registry of the court).

Accordingly, we decline to disturb the sentence on appeal.

The judgment of contempt and the sentence imposed are affirmed.

JUDGE NEY and JUDGE DAVIDSON concur.

APPENDIX B

SUPREME COURT, STATE OF COLORADO
CASE NO. 95 SC 835
CERTIORARI TO THE COLORADO COURT OF APPEALS,
95 CA 0869
DISTRICT COURT, JEFFERSON COUNTY, 92 CV 2795

ORDER OF COURT

ANTHONY CIOCCHETTI, Petitioner,

v.

LAKEWOOD FORD, INC., Plaintiff,

and Concerning the Honorable JUDGE HENRY NIETO, of the District Court, Jefferson County,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, JULY 28, 1997.
JUSTICE BENDER does not participate.